

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
NOVEMBER SESSION, 1996

HANSOM L. DAVIS, JR.,)
)
Appellant)
)
vs.)
)
STATE OF TENNESSEE,)
)
Appellee)

No. 02C01-9605-CC-00144

MADISON COUNTY

Hon. Franklin Murchison, Judge

(Post-Conviction)

FILED

March 11, 1997

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Appellate Court Clerk

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Hansom L. Davis, Jr.,¹ appeals the trial court's dismissal of his petition for post-conviction relief without the appointment of counsel or an evidentiary hearing. The appellant is currently serving an effective sentence of twenty-five years in the Tennessee Department of Correction pursuant to his 1989 convictions for aggravated rape, aggravated kidnapping, and assault. Following a review of the record, we affirm the judgment of the trial court.

I. Factual Background

On January 3, 1990, this court affirmed the appellant's convictions. See State v. Davis, No. 7 (Tenn. Crim. App. at Jackson, January 3, 1990). The sole issue presented for review was the sufficiency of the evidence. Id. In November, 1990, the appellant filed his first petition for post-conviction relief. The appellant was appointed counsel, who, in February, 1991, filed an amended petition. The amended petition alleged ineffective assistance of counsel, both at trial and on direct appeal. Following an evidentiary hearing, the trial court dismissed the appellant's petition. On April 8, 1992, this court affirmed the trial court's judgment. Davis v. State, No. 02C01-9104-CC-00064 (Tenn. Crim. App. at Jackson), perm. to appeal denied, (Tenn. 1992), and rehearing denied, (Tenn. 1995).

On November 16, 1994, the appellant filed a second petition for post-conviction relief, in which he raised, in essence, the following issues:

- (1) Whether the trial court erroneously denied the appellant's motion to suppress his pre-trial statement to the police;
- (2) Whether the prosecutor improperly referred to the appellant's pre-trial silence concerning the appellant's

¹The appellant's current petition for post-conviction relief and his signature on various documents indicate that the correct spelling of his name is "Hansom L. Davis, Jr." However, elsewhere in the record, the appellant is referred to as "Hanson L. Davis."

- illegal purchase and use of cocaine on the night of the charged offenses;
- (3) Whether the trial court unduly restricted the appellant's argument concerning his prior sexual relationship with the victim and erroneously permitted the introduction of evidence unrelated to the charged offenses;
 - (4) Whether the trial court erroneously prohibited defense counsel from cross-examining the victim concerning her prior inconsistent statements.

On November 29, 1994, the trial court summarily dismissed the appellant's petition, finding that the "grounds for relief" set forth in the appellant's petition had been previously determined and/or waived. See Tenn. Code Ann. § 40-30-109(a)(1) (1990)("[w]hen the petition has been competently drafted and all pleadings, files and records of the case which are before the court conclusively show that the [appellant] is entitled to no relief, the court may order the petition dismissed").

II. Analysis

Initially, the State notes that the appellant has failed to timely file, pursuant to Tenn. R. App. P. 4(a), his Notice of Appeal of the trial court's judgment. Moreover, the State contends that the interest of justice does not mandate the waiver of the notice of appeal requirement, as the trial court properly dismissed the appellant's post-conviction petition. See State v. Scales, 767 S.W.2d 157, 158 (Tenn. 1989)("[f]or purposes of Rule 4(a), Tenn. R. App. P., post-conviction proceedings are criminal in nature and the notice of appeal may be waived 'in the interest of justice']"). Notwithstanding the appellant's failure to comply with Rule 4(a), we simply agree that the petition was properly dismissed.

This court has observed that there is a discernible trend toward appointing counsel to assist *pro se* appellants in post-conviction proceedings, providing opportunities to amend petitions, and allowing evidentiary hearings. Carmley v.

State, No. 03C01-9305-CR-00167 (Tenn. Crim. App. at Knoxville, January 13, 1994). Nevertheless, if there is "a lack of legal merit, appearing upon the face of the petition," then the post-conviction court may dismiss the petition without permitting the appellant to confer with counsel and without an evidentiary hearing. Burt v. State, 454 S.W.2d 182, 184 (Tenn. Crim. App. 1970). See also Allen v. State, 854 S.W.2d 873, 875-876 (Tenn. 1993); Swanson v. State, 749 S.W.2d 731, 734 (Tenn. 1988). In other words, "a clear but patently non-meritorious petition may be dismissed summarily," without the appointment of counsel or an evidentiary hearing. Martucci v. State, 872 S.W.2d 947, 949 (Tenn. Crim. App. 1993); Cureton v. Tollett, 477 S.W.2d 233, 236 (Tenn. Crim. App. 1971). A petition sets forth a colorable claim if it alleges facts showing that the conviction resulted from an abridgment of a constitutional right and demonstrates that the ground for relief was not previously determined or waived. Carmely, No. 03C01-9305-CR-00167. In deciding whether a colorable claim is presented, *pro se* petitions should be held to less stringent standards than formal pleadings drafted by lawyers. Allen, 854 S.W.2d at 875. If the availability of relief cannot be conclusively determined from a *pro se* petition and the accompanying records, the appellant must be given the aid of counsel. Swanson, 749 S.W.2d at 734.

We agree with the trial court that the appellant's petition and the accompanying records conclusively demonstrate that the issues raised by the appellant in his second petition have been waived.² Tenn. Code Ann. § 40-30-

112 (1990). The appellant contends in his brief that we should remand his case to the trial court in order to provide the appellant an opportunity, with the

²All the allegations in the appellant's second petition for post-conviction relief were raised in the appellant's prior petition, but were tied to his allegations of ineffective assistance of counsel, either at trial or on appeal. In other words, the allegations in the appellant's second petition have not previously been raised as independent issues.

assistance of counsel, to amend his petition. The appellant specifically argues that he should be permitted to include in his petition the issue of counsel's deficient performance on appeal. Yet, as noted earlier, the appellant raised the issue of ineffective assistance of counsel at trial and on direct appeal during his first post-conviction proceeding. Nevertheless, the appellant argues that his prior post-conviction counsel failed to fully address ineffective assistance of counsel on appeal. More broadly, the appellant contends that he has not been afforded "a meaningful appeal of his jury trial."

The appellant's argument must fail for several reasons:

- (1) Ineffective assistance of counsel is a single ground for relief. State v. Cone, 927 S.W.2d 579, 581-582 (Tenn. Crim. App. 1995), perm. to appeal denied, (Tenn.), cert. denied, __ U.S. __, 117 S.Ct. 309 (1996). Thus, the issue of ineffective assistance of counsel on appeal has been previously determined. In Cone, this court observed:

A petitioner may not relitigate a previously determined issue by presenting additional factual allegations. We should not encourage post-conviction petitioners to invent new facts or revive an issue which was unfavorably decided, nor should we allow petitioners to "sandbag" by reserving factual claims until their second or third petition.

Id. at 582.
- (2) Moreover, the appellant is bound by the action or inaction of his prior post-conviction counsel, and an allegation of ineffective assistance of prior post-conviction counsel does not preclude application of the defenses of waiver and previous determination. House v. State, 911 S.W.2d 705, 714 (Tenn. 1995), cert. denied, __ U.S. __, 116 S.Ct. 1685 (1996).
- (3) Finally, pursuant to his first petition for post-conviction relief, the trial court appointed counsel, counsel extensively amended the appellant's petition, and the trial court conducted an evidentiary hearing on the merits of the appellant's petition. Therefore, the appellant has received a full and fair review of his trial, consistent with due process. Id. at 710-711.³

³We acknowledge the procedural predicament which confronts the appellant in his pursuit of relief. Again, however, we are precluded from considering these constitutional claims. Nevertheless, we continue to be disturbed by counsel's performance at trial, including repeated reference to members of the jury as "pea brains" during closing argument, and by the quality of counsel's brief on appeal. We are particularly troubled by counsel's performance in light of the

Accordingly, we affirm the trial court's dismissal of the appellant's petition.

DAVID G. HAYES, Judge

CONCUR:

GARY R. WADE, Judge

WILLIAM M. BARKER, Judge

victim's subsequent recantation, which we are also precluded from considering. Tenn. Code Ann. § 40-30-105 (1990)(an appellant must state a constitutional claim in order to be eligible for relief in the post-conviction context). See also Herrera v. Collins, 506 U.S. 390, 404, 113 S.Ct. 853, 862 (1993)(newly discovered evidence, alone, does not implicate constitutional rights); Massey v. State, No. 1121 (Tenn. Crim. App. at Knoxville, November 5, 1987)(a claim of newly discovered evidence does not, alone, constitute a proper ground for post-conviction relief). Contrast Tenn. Code Ann. § 40-30-217(a)(2) (1996 Supp.)(a petitioner may file a motion in the trial court to reopen his first post-conviction petition if the claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offenses for which the appellant was convicted).